

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GABRIEL L. GRASSO, ESQUIRE,)
an Individual doing business as)
GABRIEL L. GRASSO, P.C.)
a Nevada Corporation,)

Plaintiff,)
vs.)

YALE L. GALANTER, ESQUIRE,)
an Individual doing business as)
YALE L. GALANTER, P.A.,)
a Florida Corporation, and Does I through)
X and Roe Corporations I through X)
Inclusive,)

Defendants.)

Case No.: 2:12-cv-00738-GMN-NJK

AMENDED ORDER
(Amending the last paragraph of the
CONCLUSION, due to clerical error.)

Pending before the Court is the Motion to Dismiss Plaintiff's Complaint (ECF No. 16) filed by Defendant Yale L. Galanter, Esquire ("Defendant"). Plaintiff Gabriel L. Grasso, Esquire, ("Plaintiff") filed a Response (ECF No. 22) and Defendant filed a Reply (ECF No. 25).

I. BACKGROUND

In September 2007, the parties entered into a contractual agreement regarding the legal representation of criminal defendant Orenthal J. Simpson ("Simpson") in a criminal case ("Case"). (Compl. ¶ 9.) Defendant and Plaintiff agreed to associate as counsel to defend Simpson in the Case; Plaintiff was to perform local counsel duties, as Defendant is not licensed in Nevada, in addition to trial preparation and trial counsel duties (collectively, "Services"). (Compl. ¶ 13.) In exchange for Plaintiff's Services, Defendant agreed to pay Plaintiff a flat

1 \$250,000.00 legal fee (“Fee”), which represented one third of the \$750,000.00 fee Defendant
2 charged Simpson for legal representation in the Case. (Compl. ¶ 14.) Plaintiff claims to have
3 expended in excess of 1,000 hours of Services during the investigation, researching, motion
4 drafting, trial preparation, trial sentencing preparation, and the initial stages of appellate
5 preparation related to the Case. (Compl. ¶ 25.)

6 From the promised Fee for Simpson’s legal representation, Plaintiff received only one
7 \$15,000.00 payment from Defendant. (Compl. ¶ 20.) This payment covered only a small
8 portion of the Plaintiff’s costs. (*Id.*) Throughout the representation, Defendant repeatedly
9 informed Plaintiff that he had not received any payment from Simpson. (Compl. ¶ 23.)
10 However, on or about March 30, 2009, Plaintiff allegedly learned that Simpson had, in fact,
11 provided approximately \$500,000.00 to Defendant for legal fees related to the Case. (Compl. ¶
12 23.) Despite Plaintiff making numerous verbal demands and a written demand, Defendant
13 failed to make any further payments or reimbursements beyond the initial \$15,000.00. (Compl.
14 ¶ 27.)

15 As a result of Defendant’s actions, Plaintiff filed a Complaint in Nevada State Court
16 alleging seven causes of action: (1) Breach of Contract; (2) Breach of Implied Covenant of
17 Good Faith and Fair Dealing (contractual breach); (3) Breach of Implied Covenant of Good
18 Faith and Fair Dealing (tortious breach); (4) Money Due and Owing; (5) Unjust Enrichment /
19 Quantum Meruit; (6) Fraudulent or Intentional Misrepresentation; and (7) Constructive Fraud.
20 (Pet. for Removal, 4 (“Compl.”), ECF No. 1.) Subsequently, Defendant removed the action to
21 federal court (*Id.*)

22 **II. LEGAL STANDARD**

23 **A. Rule 12(b)(6)**

24 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
25 that fails to state a claim upon which relief can be granted. *See North Star Int’l v. Ariz. Corp.*

1 *Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule
2 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not
3 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.
4 *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the
5 complaint is sufficient to state a claim, the Court will take all material allegations as true and
6 construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792
7 F.2d 896, 898 (9th Cir. 1986).

8 The Court, however, is not required to accept as true allegations that are merely
9 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
10 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
11 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a
12 violation is *plausible*, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
13 *Twombly*, 550 U.S. at 555) (emphasis added).

14 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)
15 for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino*
16 *Police Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff's
17 complaint contain *only* “a short and plain statement of the claim showing that the pleader is
18 entitled to relief.” Fed. R. Civ. P. 8(a)(2). “Prolix, confusing complaints” should be dismissed
19 because “they impose unfair burdens on litigants and judges.” *McHenry v. Renne*, 84 F.3d
20 1172, 1179 (9th Cir.1996).

21 “Generally, a district court may not consider any material beyond the pleadings in ruling
22 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
23 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard*
24 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly,
25 “documents whose contents are alleged in a complaint and whose authenticity no party

1 questions, but which are not physically attached to the pleading, may be considered in ruling on
2 a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss into a motion for
3 summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule
4 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
5 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
6 materials outside of the pleadings, the motion to dismiss is converted into a motion for
7 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th
8 Cir. 2001).

9 If the court grants a motion to dismiss, it must then decide whether to grant leave to
10 amend. The court should “freely give” leave to amend when there is no “undue delay, bad
11 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by
12 virtue of . . . the amendment, [or] futility of the amendment . . .” Fed. R. Civ. P. 15(a); *Foman*
13 *v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear
14 that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow*
15 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

16 **B. Rule 9(b)**

17 Rule 9(b) of the Federal Rules of Civil Procedure provides that “[i]n alleging fraud or
18 mistake, a party must state with particularity the circumstances constituting fraud or mistake.”
19 Fed. R. Civ. P. 9(b). “Rule 9(b) serves not only to give notice to defendants of the specific
20 fraudulent conduct against which they must defend, but also to deter the filing of complaints as
21 a pretext for the discovery of unknown wrongs, to protect defendants from the harm that comes
22 from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon
23 the court, the parties and society enormous social and economic costs absent some factual
24 basis.” *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1057 (9th Cir. 2011) (citing
25 *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001)).

1 **III. DISCUSSION**

2 **A. Breach of Contract**

3 To succeed on a breach of contract claim under the law in Nevada, a plaintiff must
 4 show: (1) a valid contract existed; (2) the plaintiff performed or was excused from
 5 performance; (3) the defendant breached the terms of the contract; and (4) the plaintiff was
 6 damaged as a result of the breach. *See* Restatement (Second) of Contracts § 203 (2007);
 7 *Calloway v. City of Reno*, 993 P.2d 1259, 1263 (Nev. 2000) (“A breach of contract may be said
 8 to be a material failure of performance of a duty arising under or imposed by agreement”).

9 In the present case, Plaintiff alleges that he entered into a legal and binding contractual
 10 agreement (“Agreement”) where Defendant agreed to pay Plaintiff a flat \$250,000.00 legal fee
 11 for Simpson’s representation on the Case and to reimburse Plaintiff for all costs expended on
 12 the Case. (Compl. ¶¶ 30, 31.) Plaintiff further asserts that he has performed all duties and
 13 obligations required by the Agreement and that he is excused from any existing duties or
 14 obligations due to Defendant’s non-performance of the Agreement. (Compl. ¶ 32.) Finally,
 15 Plaintiff’s Complaint states that Defendant’s failure to pay the \$250,000.00 fee and
 16 Defendant’s failure to reimburse Plaintiff’s costs constitutes a breach of the Agreement.
 17 (Compl. ¶¶ 33, 34.) Accordingly, Plaintiff has provided sufficient basis from which the Court
 18 can conclude that Defendant plausibly breached the alleged agreement.

19 In his Motion to Dismiss, Defendant argues that this fee-splitting Agreement violates
 20 Rule 1.5(e) of the Nevada Rules of Professional Conduct. A division of a fee between lawyers,
 21 who are not in the same firm, is only allowed if (1) the total fee is reasonable, (2) the client
 22 agrees to the fee splitting, including the share each lawyer will receive, and (3) the agreement is
 23 in writing. Nev. Rules of Prof’l Conduct R. 1.5(e). As such, Defendant contends that granting
 24 relief to Plaintiff would contravene Rule 1.5(e) and frustrate its purpose; the fee-splitting
 25 agreement was not in writing and the client did not consent to the fee-splitting agreement. (ECF

1 No. 16-10.)

2 Defendant also argues that the Nevada Supreme Court has not decided whether an
3 attorney may recover a fee that was made pursuant to an alleged agreement that violates the
4 requirements of Rule 1.5(e). (*Id.* at 16-10.) To support this proposition, Defendant cites a
5 California Supreme Court case, *Chambers v. Kay*, 56 P.3d 126 (Cal. 2002), and an Illinois case
6 from the Seventh Circuit, *Jack S. Kaplan v. Pavalon & Gifford*, 12 F.3d 87 (7th Cir. 1993), to
7 support his argument. (ECF No. 16-13 and 16-17). However, neither of these cases is
8 controlling authority. Thus, Defendant fails to provide the Court with any controlling legal
9 authority to support his argument. Despite Defendant's assertion otherwise, the Nevada
10 Supreme Court, in *Shimrak v. Garcia-Mendoza*, addressed this issue and indicated that an
11 attorney is not permitted to use his own violation of the ethics rules to shield himself from
12 contractual liability. 912 P.2d 822, 826 (1996) (the Court found it would be inequitable to allow
13 the attorney to benefit from free investigative services because he violated the ethical rules).

14 For these reasons, Defendant has failed to establish that Plaintiff's Complaint is
15 defective. Therefore, the Court denies Defendant's Motion to Dismiss regarding Plaintiff's
16 breach of contract cause of action.

17 **B. Breach of the Covenant of Good Faith and Fair Dealing**
18 **(In Contract and In Tort)**

19 **1. Contractual Breach**

20 To state a claim of breach of the covenant of good faith and fair dealing, Plaintiff must
21 allege: (1) Plaintiff and Defendants were parties to an agreement; (2) Defendants owed a duty
22 of good faith to the Plaintiff; (3) Defendants breached that duty by performing in a manner that
23 was unfaithful to the purpose of the contract; and (4) Plaintiff's justified expectations were
24 denied. *Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995). In Nevada, an implied covenant of
25 good faith and fair dealing exists in every contract, *Consol. Generator-Nevada v. Cummins*

1 *Engine Co., Inc.*, 971 P.2d 1251, 1256 (Nev. 1998), and a plaintiff may assert a claim for its
 2 breach if the defendant deliberately contravenes the intention and spirit of the agreement,
 3 *Morris v. Bank Am. Nev.*, 886 P.2d 454 (Nev. 1994).

4 In the present case, Plaintiff alleges a claim for tortious breach and a claim contractual
 5 breach of the covenant of good faith. In his Complaint, Plaintiff asserts that a contractual
 6 agreement existed and that Defendant owed an implied duty of good faith to the Plaintiff
 7 because of the existence of the Agreement. Plaintiff further alleges that Defendant breached
 8 this duty by withholding payment due to Plaintiff and failing to disclose that Simpson had, in
 9 fact, paid Defendant. (Compl. ¶¶ 54, 55.) Moreover, Plaintiff asserts that his expectations of
 10 being paid and reimbursed for his legal services and costs expended on the Case were denied.
 11 Thus, the Court concludes that Plaintiff's Complaint "give[s] [D]efendant fair notice of a
 12 legally cognizable claim and the grounds on which it rests." *See Bell Atl. Corp. v. Twombly*,
 13 550 U.S. 544, 555 (2007). For this reason, the Court denies Defendant's Motion to Dismiss as
 14 to Plaintiff's cause of action for Contractual Breach of the Implied Covenant of Good Faith and
 15 Fair Dealing.

16 **2. Tortious Breach**

17 In contrast to a claim for contractual breach of the covenant, a plaintiff claiming a
 18 tortious breach must also allege the existence of a special relationship of reliance or a fiduciary
 19 duty. *See A.C. Shaw Constr., Inc. v. Washoe Cnty.*, 784 P.2d 9, 10 (Nev. 1989) (per curiam).
 20 Furthermore, a tort action for breach of the covenant is limited to "rare and exceptional cases."
 21 *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 934 P.2d 257, 263 (Nev. 1997) (citing *K Mart Corp.*
 22 *v. Ponsock*, 732 P.2d 1364, 1370 (Nev. 1987)). Specifically, tort liability for breach of the
 23 good faith covenant is appropriate only where "the party in the superior or entrusted position"
 24 has engaged in "grievous and perfidious misconduct." *Id.* at 263 (citation omitted). Moreover,
 25 the Nevada Supreme Court has denied tort liability in certain relationships where agreements

1 have been heavily negotiated and the aggrieved party was highly sophisticated. *Id.* at 263
 2 (citation omitted).

3 In the present case, Plaintiff merely alleges that Defendant owed Simpson a fiduciary
 4 duty, and therefore, Defendant is the caretaker of the fees and costs paid towards Simpson's
 5 defense in the Case. (Compl. ¶ 52.) Plaintiff also asserts that he relied on the fact that
 6 Defendant would pay him for the Services rendered and would reimburse him for all costs
 7 associated with Simpson's representation. These allegations are insufficient to plead the
 8 plausible existence of the requisite fiduciary relationship between Plaintiff and Defendant.
 9 Accordingly, Defendant's Motion to Dismiss this cause of action is GRANTED and Plaintiff's
 10 Cause of Action for Tortious Breach of the Covenant of Good Faith and Fair Dealing is
 11 DISMISSED.

12 **C. Money Due and Owing**

13 A district court will grant a motion to dismiss only when the complaint fails to give the
 14 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
 15 *Atl. Corp. v. Twombly*, 550 U.S. at 555. Nevada courts routinely recognize Plaintiff's Fourth
 16 Cause of Action for "Money Due and Owing" as a cognizable claim in Nevada. *See, e.g., M.C.*
 17 *Multi-Family Dev., L.L.C. v. Crestdale Associates, Ltd.*, 193 P.3d 536, 547 (Nev. 2008); *Las*
 18 *Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 182 P.3d 764, 766 (Nev.
 19 2008).

20 In the present case, Plaintiff alleges that he has satisfied all the conditions under the
 21 Agreement while, on the other hand, Defendant has not. (Compl. ¶¶ 61, 62.) Plaintiff alleges
 22 that Defendant had an obligation to compensate Plaintiff for the Services rendered in Simpson's
 23 legal representation and for the costs Plaintiff incurred for his Services. Moreover, Plaintiff
 24 asserts that Defendant's failure to pay the alleged agreed upon Fee has resulted in Defendant
 25 owing money to Plaintiff. Thus, Plaintiff's Complaint gives legally cognizable notice for why

1 Defendant owes money to Plaintiff. Therefore, the Court denies Defendant's motion to dismiss
2 regarding Plaintiff's cause of action for Money Due and Owing.

3 **D. Unjust Enrichment / Quantum Meruit**

4 "An action based on a theory of unjust enrichment is not available when there is an
5 express, written contract, because no agreement can be implied when there is an express
6 agreement." *Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997)
7 (per curiam). Thus, the doctrine of unjust enrichment only "applies to situations where there is
8 no legal contract but where the person sought to be charged is in possession of money or
9 property which in good conscience and justice he should not retain but should deliver to
10 another [or should pay for]." *Id.* Unjust enrichment occurs whenever a "person has and retains
11 a benefit which in equity and good conscience belongs to another." *Nevada Indus. Dev. v.*
12 *Benedetti*, 741 P.2d 802, 804 n.2 (Nev. 1987). The Nevada Supreme Court has observed that
13 the essential elements of unjust enrichment "are a benefit conferred on the defendant by the
14 plaintiff, appreciation by the defendant of such benefit, and acceptance and retention by the
15 defendant of such benefit." *Unionamerica Mtg. v. McDonald*, 626 P.2d 1272, 1273 (Nev.
16 1981).

17 Here, Plaintiff's Complaint appears to allege that, if the Court were to find that no valid
18 contract existed between the parties, then Plaintiff would still be entitled to recover under a
19 theory of unjust enrichment. (*See* Compl. ¶¶ 64-72 .) Specifically, Plaintiff alleges that he
20 performed services that "conferred value upon Defendant Galanter, making them liable for
21 disgorgement of that value in Quantum Meruit." (Compl. ¶ 66.) Plaintiff further alleges that
22 "Defendant Galanter has unjustly retained the money of Plaintiff Grasso, after receiving the
23 value and benefit of Mr. Grasso's work and services in the Case." (Compl. ¶ 68.) Accordingly,
24 the Court finds Plaintiff has adequately pleaded a claim for unjust enrichment. Thus, the Court
25 denies Defendant's Motion to Dismiss Plaintiff's Fifth Cause of Action for Unjust Enrichment /

1 Quantum Meruit.

2 **E. Fraudulent or Intentional Misrepresentation**

3 To state a claim for fraud or intentional misrepresentation, a plaintiff must allege three
4 factors: (1) a false representation by the defendant that is made with either knowledge or belief
5 that it is false or without sufficient foundation; (2) an intent to induce another's reliance; and
6 (3) damages that result from this reliance. *See Nelson v. Heer*, 163 P.3d 420, 426 (Nev. 2007).
7 A claim of "fraud or mistake" must be alleged "with particularity." Fed. R. Civ. P. 9(b). A
8 complaint alleging fraud or mistake must include allegations of the time, place, and specific
9 content of the alleged false representations and the identities of the parties involved. *See Swartz*
10 *v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

11 In the present case, Plaintiff asserts that Defendant, during the course of his association
12 with Plaintiff, "made false representations to Plaintiff in order to avoid compliance with his
13 obligations under the Agreement." (Compl. ¶ 74.) Specifically, Plaintiff alleges that Defendant
14 repeatedly told Plaintiff that Simpson had not provided any payment for the fees and costs
15 associated with the joint representation of Simpson in the Case. (Compl. ¶ 75.) Plaintiff further
16 alleges that Defendant made such statements knowing that Simpson actually paid Defendant.
17 (Compl. ¶ 76.) Additionally, Plaintiff alleges that Defendant made such false and misleading
18 statements to prevent Plaintiff from being compensated pursuant to the terms of the Agreement.
19 (Compl. ¶ 78.) Thus, Plaintiff has satisfied Rule 9(b); his Complaint "include[s] allegations of
20 the time, place, and specific content of the alleged false representations and the identities of the
21 parties involved. *See Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Therefore, the
22 Court denies Defendant's Motion to Dismiss as to this Plaintiff's cause of action for Fraudulent
23 or Intentional Misrepresentation.

24 **F. Constructive Fraud**

25 Constructive fraud is the breach of some legal or equitable duty, which, irrespective of

1 moral guilt, the law declares fraudulent because of its tendency to deceive others or to violate
2 confidence. *Long v. Towne*, 639 P.2d 528, 529-30 (Nev. 1982) (citation omitted). Constructive
3 fraud is characterized by a breach of duty arising out of a fiduciary or confidential relationship.
4 *Id.* at 530 (citation omitted). A confidential or fiduciary relationship exists when one “reposes
5 a special confidence in another so that the latter, in equity and good conscience, is bound to act
6 in good faith and with due regard to the interests of the one reposing the confidence.” *Id.*
7 (citation omitted).

8 Plaintiff asserts that Defendant owed a legal or equitable duty to Plaintiff arising from a
9 fiduciary or confidential relationship, which Defendant breached by misrepresenting and
10 concealing material facts. (Compl. ¶ 85.) Particularly, Plaintiff alleges Defendant repeatedly
11 stated to Plaintiff that he had not been paid by Simpson and/or his representatives for the fees
12 and costs associated with the joint representation of Simpson. (Compl. ¶ 86.) In addition,
13 Plaintiff alleges that Defendant concealed from Plaintiff that he had, in fact, been paid large
14 sums of money by Simpson for the fees and costs associated with the joint representation.
15 (Compl. ¶ 87.) These allegations are insufficient to plead the plausible existence of a fiduciary
16 or confidential relationship between Plaintiff and Defendant. Accordingly, Defendant’s Motion
17 to Dismiss this cause of action is GRANTED and Plaintiff’s Seventh Cause of Action for
18 Constructive Fraud is DISMISSED.

19 **IV. CONCLUSION**

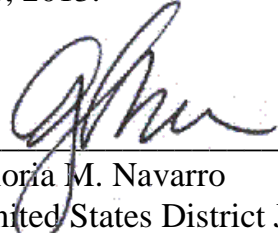
20 **IT IS HEREBY ORDERED** that Defendant’s Motion to Dismiss (ECF No. 16) is
21 hereby **GRANTED in part** and **DENIED in part**.

22 **IT IS FURTHER ORDERED** that, if Plaintiff can cure the defects identified in this
23 Order, Plaintiff shall file his amended complaint by **Friday, October 4, 2013**. Failure to file an
24 amended complaint by that date will result in **DISMISSAL** of Plaintiff’s Cause of Action for
25 Tortious Breach of the Covenant of Good Faith and Fair Dealing and Plaintiff’s Cause of

1 Action for Constructive Fraud, **with prejudice**.

2 **DATED** this 4th day of October, 2013.

3 **NUNC PRO TUNC DATE:** September 20, 2013.

4
5
6 
7 _____
8 Gloria M. Navarro
9 United States District Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25